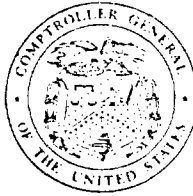


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-186084

DATE: August 31, 1976

MATTER OF: New World Research Corporation

98101

DIGEST:

1. Bid bond requirement in AID-approved solicitation was not met where principal of alleged joint adventure purchased bid bond in its own name only. Failure to provide adequate bid bond constitutes a material deviation from the tender requirements and is not subject to waiver thereunder.
2. Where bidder under AID-approved solicitation did not offer requisite indemnification for defective products, AID's approval of award by grantee was not proper under terms of Grant Agreement. Nevertheless, the contract should not be disturbed since award was made in good faith, based on finding that the bid was acceptable to grantee, and since the contract has been at least partially completed. Agency advised to supervise more closely drafting of tender documents so as to reflect grantee's needs.

New World Research Corporation (NWRC), by its letter dated March 19, 1976, protested against an award of a contract by the Arab Republic of Egypt (ARE) to any other bidder under specification No. 4818-01-4, issued pursuant to the Agency for International Development's (AID) grant No. 263-12-001. Subsequently NWRC sued to compel AID to rescind its approval of an award to Westinghouse (New World Research Corporation, et al. v. Daniel Parker, et al., Civil Action No. 76-0499, now pending before the United States District Court for the District of Columbia). NWRC has moved for and been denied interlocutory orders to enjoin AID's execution of its obligation under the grant. In an order dated May 5, 1976, the court requested this Office to decide NWRC's protest. Since the grant requires AID's approval of tender evaluation and contract award, the issues to be decided are (1) whether AID properly approved ARE's refusal to consider NWRC's alternate tender, and (2) whether AID properly approved ARE's award to Westinghouse Electric Corporation (Westinghouse).

In the Findings of Fact, and Conclusions of Law supporting the court's May 5, 1976 order, the court found as follows:

FINDINGS OF FACT

"1. By this action plaintiff New World Research Corporation (NWRC) and its alleged joint venturer, Kinney Electrical Manufacturing Company (Kinney) seek alternatively (1) an order enjoining the defendant Agency for International Development (AID), and its administrator, defendant Daniel Parker, from approving the award of a contract pursuant to specification No. 4818-01-4 pending a decision by the General Accounting Office (GAO) on the bid protest that plaintiffs have filed with that agency, or (2) in the event the defendants have already approved the award, an order requiring defendants to rescind their approval.

"2. Plaintiffs' complaint relates to the procurement by the Arab Republic of Egypt (ARE) of power distribution fuse boxes. The procurement is to be financed by the United States pursuant to a Grant Agreement, AID Grant No. 263-12-001. This Court has recently construed the provisions of this Grant Agreement in another case involving a procurement by the ARE. See Sola Basic Industries v. Daniel Parker, et al., Civil Action No. 76-0282 (D.D.C., filed February 20, 1976).

"3. As noted in this Court's Findings of Fact and Conclusions of Law in the Sola Basic case, the Grant Agreement provides that procurements will be made by the ARE, although AID reserves the right under § 5.01 of the Grant Agreement, to 'approve solicitations and bid documents prior to their issuance and all contracts and amendments thereto prior to their execution * * *'. The Grant Agreement also imposes additional

limitations on the procurement rights of the ARE. Section 3.04 of the Grant Agreement provides that '[n]o more than reasonable prices shall be paid for any goods or services financed * * * under the Grant * * *' and that '[s]uch items shall be procured on a fair and on a competitive basis in accordance with procedures therefor prescribed in Implementation Letters.'

"4. The Egyptian Power Ministry (Ministry) hired the engineering firm of Sanderson & Porter, Inc., of New York City to act as their consultant on the procurements to be effected under the Grant. The consultant and the Ministry prepared the bid invitation document for power distribution fuse boxes, Specification No. 4818-01-4.

"5. Pursuant to its authority under the Grant Agreement, defendant AID approved the document dated August 12, 1975, entitled 'Conditions of Tender, Specifications and Terms of Contract for the supply of: Power Distribution Fuse Boxes (main distribution boxes), Specification No. 4818-01-4.' This tender document served to invite United States manufacturers to submit bids for the supply of the equipment to which this action relates. The procurement was advertised as a competitive bidding procurement.

"6. As required by the bid invitation document, the competing tenderers submitted sealed bids to the ARE, with copies to defendant AID. NWRC submitted a bid signed only by itself, but NWRC enclosed with its bid a letter from Kinney, which plaintiffs characterize as evidence of a joint venture relationship between NWRC and Kinney for purposes of the fuse box procurement. As explained infra, the merits of the present lawsuit turn largely on the significance to be accorded the Kinney letter.

[At the public bid opening held in Cairo, Egypt, on November 11, 1975, four bids were received. NWRC was disqualified for award for the reasons stated below, even though its base bid and its alternate bid (the submission of which was permitted by the tender) were low. Award was subsequently made to Westinghouse on the basis of its second low alternate bid.]

"8. After the bid openings the ARE decided to disqualify NWRC's bid for the reason that NWRC was not a qualified bidder. This conclusion stemmed from Article 36 of the Conditions of Tender, which requires that the contractor must manufacture at least 40 percent of the value of the goods to be supplied. A large percentage of the goods to be supplied under the NWRC bid would have been supplied by plaintiff Kinney, and together NWRC and Kinney would have met the 40 percent requirement. The ARE determined, however, that the NWRC bid did not comply with the provisions of Article 3 of the conditions of Tender which would have qualified NWRC to submit its tender as Kinney's agent.

"9. Counsel for defendants has represented to the Court in memoranda and during the hearings in this case that the ARE ultimately selected the alternative bid of Westinghouse Electric Corporation, that AID approved the award of the contract to Westinghouse on February 19, 1976, that the ARE and Westinghouse executed the contract on March 14, 1976, that most of the requisite drawings have been completed and a prototype assembled, and that Westinghouse will begin

full production by May 3, 1976. Defendants have provided no evidentiary support for these representations, however.

"10. On March 19, 1976, plaintiffs filed a letter of protest with the GAO, in which plaintiffs complained that they had been improperly disqualified and that the NWRC bid plus the Kinney letter that NWRC had submitted with its bid met the requirements for joint venturers as specified in Article 12(b) of the conditions of Tender. As a result of plaintiffs' letter to GAO, GAO instituted a proceeding (No. B-186084), which is now pending to determine the lawfulness of defendant AID's actions in approving the disqualification of NWRC's bid.

"11. In this case plaintiffs rest their argument in favor of injunctive relief on the terms of the Kinney letter that NWRC submitted with its bid. Plaintiffs contend that that letter satisfies the requirements of Article 12(b) of the Conditions of tender. The text of the Kinney letter reads as follows:

Kinney Electrical Mfg. Co., Inc.
does not transact international sales
from the corporation directly, but
execute [sic] sales to purchasers out-
side the U.S. through independent sales
organization [sic]

"13. Since only NWRC signed the tender it submitted, NWRC and Kinney were required by the terms of Article 12(b) to furnish 'satisfactory proof' that NWRC was authorized to sign for Kinney. The Kinney letter provided the only indication of any involvement by Kinney in NWRC's tender. Neither the tender nor the NWRC bid bond referred to the existence of a joint venture. The Kinney letter does not expressly state that Kinney had authorized NWRC to sign NWRC's tender for Kinney.

"14. The defendants contend that the statements contained in the Kinney letter were ambiguous as to whether NWRC possessed authority to bind Kinney as a primary party to the contract. The agency reasons that 'because this contract was part of a reconstruction effort in a relatively remote, underdeveloped area, the Egyptian Government was within its rights in requiring clear and unequivocal responsibility of principal manufacturers in the bid.' See Exhibit 1 to Plaintiffs' Motion for Preliminary Injunction.

"15. Plaintiffs contend that even if defendants acted properly in disqualifying NWRC's bid, Westinghouse's bid must also be disqualified. The Westinghouse bid differs in the following respects from the Conditions of Tender:

(a) Article 32 of the General Conditions provides that the purchaser may require the contractor to proceed with certain changes in the contract subject to the right of AID to approve 'material modifications and/or changes in the scope of the Contract that will result in a change in total cost.' The Westinghouse tender provides that Article 32 is acceptable with the provision that Westinghouse would not proceed with 'any changes' pending written approval from AID.

(b) Article 36 of the General Conditions provides that any subcontract in excess of \$100,000 must be approved in writing by AID. A 'subcontractor' is defined in Article 21 of the General Conditions as 'any organization with whom Contractor enters into an agreement for providing * * * materials * * *.' The Westinghouse tender proposes to accept Article 36 'with the understanding that raw materials and bulk items are excluded from the approval requirements.'

(c) Article 47 of the General Conditions sets forth a broad indemnification provision

whereby the contractor must indemnify the Ministry for all losses, claims and so forth. The Westinghouse tender provides that its liabilities would be subject to losses, claims, and so forth, 'arising within the United States * * *.'

(d) Article 48 of the General Conditions contains a broad indemnification provision to protect the purchaser against patent claims. The Westinghouse tender would limit this liability to claims arising where there is a United States patent corresponding to the Egyptian patent allegedly infringed. The Westinghouse tender also provides Westinghouse with certain options for curing such a claim and would relieve Westinghouse of any liability for certain 'costs and expenses' such as costs and expenses resulting from 'down time.'

(e) The Westinghouse tender adds an entirely new article entitled Article 56, 'Limitation to Liability,' to the General Conditions. This new article would appear potentially to limit Westinghouse's liability in several respects. For example, it would relieve Westinghouse of any liability for 'incidental or consequential loss or damage whatsoever.' That proviso is made applicable by Westinghouse to the basic Article 47 indemnification provision of the General Conditions.

These same differences between the Conditions of Tender and the successful Westinghouse bid were noted by this Court in the Findings of Fact in the Sola Basic case.

"16. As reflected in the affidavit of defendant Daniel Parker, defendants believe that the project being financed by AID Grant No. 263-12-001, of which the procurement involved here is a part, 'is a vital component of United States foreign policy objectives in the Middle East, and a delay of any

one of the procurements financed under this grant would have the effect of delaying the completion of the entire project.' See Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, at 6."

Responsiveness of NWRC's Tender

It is particularly relevant that (1) NWRC signed the bid in its own name, (2) NWRC is not a manufacturer of electrical equipment, (3) in order to be qualified to receive the award, the bidder must manufacture forty percent of the dollar value of the equipment supplied and, (4) only if the contract is awarded to NWRC-Kinney, Joint Venture, can award be made to any entity involving NWRC, since Kinney is a manufacturer of 40% of the dollar value of the equipment supplied. But, because the bid bond designated only NWRC as principal, that fact is dispositive of whether the alleged joint venture of NWRC-Kinney, was responsive to the tender's requirements.

Article 6 of the solicitation required each tenderer to submit a bid bond:

"* * * to insure that the Tenderer upon acceptance of the Tender will execute the Contract Documents * * * and, at the same time, deliver the Performance Bond * * *."

NWRC submitted six bid bonds in the aggregate amount of \$430,000.00. NWRC was named as Principal, and Sentry Insurance-A Mutual Company was named as Surety, but no mention in the bid bond was made of Kinney or NWRC-Kinney, Joint Venture. NWRC signed the bid bond in its own name. The bid bond by its terms carried the Surety's obligation to pay the penalty sum in the event NWRC was awarded the contract and, thereafter, did not execute the contract documents or post the required performance bond. NWRC has steadfastly maintained, however, that the legal entity NWRC-Kinney, Joint Venture is the tenderer and that it should be awarded the contract.

What is the surety's obligation if NWRC-Kinney, Joint Venture, is awarded the contract but refuses to execute the contract or post the required performance bond? In B-166799, May 15, 1969, this

Office held, in a similar situation, that the low bid should be rejected as nonresponsive because surety would not be liable. In that case the low bidder was identified as "Sumitomo Electric Industries, Ltd., Osaka, Japan"; however, the bid was signed by the "V.P. and Gen. Mgr. of Los Angeles Office, Sumitomo Shoji N. Y., Inc." Attached to and made a part of the low bid was a power of attorney whereby Sumitomo Electric appointed and authorized:

"* * * Sumitomo Shoji New York, Inc.,
Los Angeles Office * * * to act as its
true and lawful attorney, and on its behalf
to do the following acts and deeds in con-
nection with [the solicitation] * * *.

1. To make and sign the bid for the
above mentioned tender.
2. To furnish a bid bond and/or
performance bond.
3. To negotiate with the United States,
Department of Interior, Bureau of
Reclamation.
4. To sign and to execute the contract
with United States, Department of
Interior, Bureau of Reclamation when
the said bid is awarded.
5. To engage in any other activity
which may be related to or connected
with the above mentioned acts and deeds."

The question resolved in that case was whether the low bid could be accepted, since the bid bond named "Sumitomo Shoji New York, Inc." as the principal and not Sumitomo Electric, the bidder. In resolving the question, we relied upon our decision which is reported at 44 Comp. Gen. 495 (1965), wherein the bidder was an affiliate of, but not the same legal entity as, the principal named in the bid bond. In that decision we stated:

"* * * It is a general rule of the law of
Suretyship that no one incurs a liability
to pay a debt or perform a duty for another

unless he expressly agrees to be so bound, for the law does not create relationships of this character by mere implication. Suretyship, therefore, generally arises only by express contract of the parties."

* * * * *

"* * * To permit a bidder to establish the surety's obligation on a bid bond after bid opening would tend to compromise the integrity of the competitive bid system by making it possible for a bidder to decide after opening whether or not to make his bid acceptable. Also, undue delays could be caused in effecting procurements and inconsistencies in the treatment of bidders could be created because of the subjective determinations by different contracting officers. It has often been stated that the maintenance of the integrity of the system is infinitely more in the public interest than a financial saving in any individual case. * * *" 44 Comp. Gen. 495, 497 (1965). Also see, A.D. Roe and Company, Inc. 54 Comp. Gen. 271, 74-2 CPD 194 for general discussion of rule as to surety's strictissimi juris liability.

It is clear that NWRC alone, being a non-manufacturer, does not qualify for award. Even if we agree with NWRC that Kinney's letter accompanying the bid was sufficient to make the bid that of NWRC-Kinney, Joint Venture, we are left with the fact that the bid bonds solely identify Kinney as principal. An award to NWRC-Kinney Joint Venture, would be to an entity different from that named in the bond. In the event NWRC-Kinney, Joint Venture, failed to execute the contract or furnish any required bonds we believe that the surety could maintain that it had incurred no liability since the bonds named as principal only NWRC. The lack of such obligation (1) would " * * * limit * * * rights of the Ministry * * *" in a material way so as to render the bid "non-responsive" under Article 13(a)(2) of the specification, and (2) would not be subject to cure after bids have been

opened, since permitting such cure would place the tenderer in the position of either allowing its tender to be found non-responsive or making the tender acceptable.

For the foregoing reasons, we believe that, even if NWRC intended to act on behalf of NWRC-Kinney, Joint Venture, in procuring the bid bond, its tender would have been materially non-responsive and could not have been accepted by ARE and, if accepted, approved by AID.

Responsiveness of Westinghouse's Bid

The exception taken by Westinghouse to Article 47 of the General Conditions of the tender clearly renders its bid non-responsive. Article 47 entitled Indemnity states as follows:

"The contractor shall indemnify and save harmless the Ministry and the Engineer, and their officers, agents, and employees, from and against all losses and all claims, demands, payments, suits, actions, recoveries and judgments of every nature and description made, and related costs and expenses brought or recovered against the Ministry and/or the Engineer related to Apparatus provided under this agreement by reasons of any act, omission to act, or status of liability of the Contractor, his Subcontractors, agents or employees."

This clause provides, in effect, for the Contractor's liability for claims and judgments paid by the Government of Egypt arising out of the Contractor's negligence in manufacturing and supplying the fuse boxes.

Westinghouse purported to accept this Article with the provision that:

"* * * the Contractor's liabilities are subject to losses, claims, demands, etc. arising within the United States and occurring during the performance of the Contract resulting directly and solely from the negligence of the Contractor while engaged in work under this Contract.

Any liability hereunder is subject to the Article 56 entitled: 'Limitation of Liability'."

Article 56 inserted by Westinghouse in its bid, excludes from liability:

"* * * loss or damage sustained as a result of the operation of the equipment, loss of use, expenses involving costs of capital, claims of customers, loss of profits or revenues, cost of purchased or replacement power including additional expenses incurred in using existing power facilities, or any other indirect incidental or consequential loss or damage whatsoever."

and includes only warranties specified in the tender. The specified warranties of Article 41 require the contractor to:

"* * * guarantee that all the Apparatus delivered corresponds to the technical specifications and [to guarantee] the quality of the materials used, the proper workmanship and the construction of the Apparatus delivered."

If the included guarantee is breached:

"* * * the Contractor shall, at his own expense and to the satisfaction of the Ministry, restore, make good or renew such portions, if any, of the Apparatus as shall be found to be unsound or defective so that the Apparatus will, at the expiration of the period of guarantee, be in perfectly sound and satisfactory working condition, including the replacement and/or repair of defective parts during operation if such defect is due to faulty design or defective construction or workmanship and not to ordinary fair wear and tear.

* * * * *

"* * * All expense of furnishing new parts or new Apparatus or making alterations to installed parts or installed Apparatus

and of tests made necessary by failure of the Apparatus to meet the guarantees and other requirements of the Specification shall be borne by the Contractor, including removal and reinstallation costs, if any, and related transportation and insurance costs, but excluding consequential damages. "

Excluded from the warranty by Westinghouse's exception to Article 41 are:

"* * * all other warranties [except the foregoing] of quality whether written, oral, or implied (including any warranty of merchantability or fitness for purpose). "

In summary, what began as a contractor's obligation to indemnify the ARE against any claims arising out of a contractor's negligence, was by virtue of Westinghouse's exceptions, converted to an obligation (to the extent of repairing or replacing defective equipment) to indemnify ARE against claims arising in the United States during the performance of the contract and attributable to Westinghouse's negligence.

AID argues that the above qualification is not a material modification under Article 13(a), because Articles 23(g), (33), and (37) limit the contractor's "responsibility" to up to the time of the equipment's arrival in Egypt. Those articles, however, are merely shipment terms and are intended to ascribe risk of loss responsibility of the cargoes. Moreover, AID is incorrect in its contention that Article 41(b) of the General Conditions contains a provision exempting the contractor from consequential damages for breach of the contract's guarantee provision. The contractor is only exempted from bearing, as an expense of replacement or repair of defective Apparatus, the consequential damages resulting from such replacement or repair.

However, we are advised by AID that the ARE considered the "clarifications" made by Westinghouse in its tender "to be minor informalities and not such as would render the Westinghouse tender non-responsive."

NWRC has also argued that Westinghouse's bid took exception to the requirement that the circuit breakers listed under items 5 and 7 of paragraph 8.1.2 of the Specifications, be rated at "600 volts". AID responded to this allegation by assuring this Office that the circuit breakers offered are considered to be "600 volt class" and that, in any event, Westinghouse's equipment is acceptable to ARE. NWRC asserted in response to AID's comments that, at best, the configuration offered by Westinghouse would be in the 480 volt class.

It is clear, however, that Westinghouse took material exceptions to the indemnification provision of the tender. It may be that none of the remaining tenders was responsive, in which case award to Westinghouse could have been justified on the basis of urgency. Sola Basic Industries, Inc., B-185505, April 7, 1976, 76-1 CPD 232. Nevertheless, on the record before us we cannot say that AID's approval of the award was in accordance with the Grant Agreement provision that award would be made to the lowest responsive tenderer. On the other hand, it appears that AID did approve the award to Westinghouse in good faith based on its finding that the tender was acceptable to the user-grantee. Moreover, the contract has been at least partially completed. Therefore, we do not recommend that the award be disturbed.

However, we believe that this case and Sola Basic Industries, Inc., supra, where similar issues were involved, demonstrate a need to draft the tender documents so as to more closely conform to the needs of the grantee and to eliminate speculation among bidders as to what will be acceptable to the grantee. We are advising the agency of our views in this regard.


Acting Comptroller General
of the United States